No. 93-599

FILED
JAN 13 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAN KRC, PETITIONER

v.

UNITED STATES INFORMATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

27 pp

QUESTIONS PRESENTED

1. Whether the court of appeals' decision after remand was consistent with its decision before remand.

2. Whether the courts below correctly determined that summary judgment on petitioner's equal protection claim was appropriate.

3. Whether the United States Information Agency's (USIA) termination of petitioner's limited appointment to the Foreign Service comported with due process.

4. Whether the USIA's decision to terminate a limited appointment to the Foreign Service pursuant to Section 611 of the Foreign Service Act of 1980 (Act), 22 U.S.C. 4011, is "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2).

5. Whether the courts below correctly concluded that the Foreign Service Grievance Board lacked jurisdiction to review petitioner's challenge to the termination of his limited appointment under Section 611 of the Act, because terminations under Section 611 are expressly excluded from the definition of "grievance[s]" over which the Board has jurisdiction, 22 U.S.C. 4131(b)(3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Berenyi v. *District Director, INS*, 385 U.S. 630 (1967)	16
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	18
Cole v. *Young*, 351 U.S. 536 (1956)	23
Department of the Navy v. *Egan*, 484 U.S. 518 (1988)	5, 7, 14, 23
Egan v. *Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, 484 U.S. 518 (1988)	5, 7, 14, 23
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	16
Hill v. *Department of the Air Force*, 844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988)	23
Paul v. *Davis*, 424 U.S. 693 (1976)	19
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	10, 15
Sampson v. *Murray*, 415 U.S. 61 (1974)	19
United States v. *Doe*, 465 U.S. 605 (1984)	16
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	16
Webster v. *Doe*, 486 U.S. 592 (1988)	15, 20, 21
Wisniewski v. *United States*, 353 U.S. 901 (1957)	12

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	6, 18, 20
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	6
§ 5 U.S.C. 701(a)(2)	8, 21
Foreign Service Act, 22 U.S.C. 3901 *et seq.*:	
§ 101(a)(4), 22 U.S.C. 3901(a)(4)	22

Statutes—Continued: Page

§ 105, 22 U.S.C. 3905 18
§ 105(a), 22 U.S.C. 3905(a) 21
§ 610, 22 U.S.C. 4010 2
§ 610(a)(1), 22 U.S.C. 4010(a)(1) 18
§ 610(a)(2), 22 U.S.C. 4010(a)(2) 2, 8, 11, 13, 22
§ 610(a)(2)(B), 22 U.S.C. 4010(a)(2)(B) 13
§ 611, 22 U.S.C. 4011 ..... 2, 5, 8, 13, 21, 22
§ 1101(b)(3), 22 U.S.C. 4131(b)(3) 5, 13, 23
§ 1105(a), 22 U.S.C. 4135(a) 14
National Security Act of 1947, § 102(c), 50 U.S.C. 403(c) 8, 21
5 U.S.C. 2302(b)(10) 21, 22
28 U.S.C. 2680(h) 10

Miscellaneous:

55 Fed. Reg. 31,963 (1990) 20
3 Foreign Affairs Manual (1984) 18

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-599

JAN KRC, PETITIONER

v.

UNITED STATES INFORMATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 5a-34a) is reported at 989 F.2d 1211. The opinion of the court of appeals before remand (Pet. App. 35a-54a) is reported at 905 F.2d 389. The opinions and orders of the district court after remand (Pet. App. 55a-68a) and before remand (Pet. App. 69a-83a, 86a-90a) are unreported. The decisions of the Foreign Service Grievance Board (Pet. App. 92a-100a and 101a-119a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1993. A petition for rehearing was denied on July 23, 1993. Pet. App. 4a. The petition for a writ of certiorari was filed on October 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In September, 1982, petitioner entered the Foreign Service under a limited appointment as an officer candidate. In 1983 he was posted to Belgrade, Yugoslavia, as a Foreign Service Information Officer for the USIA. During this posting, petitioner engaged in homosexual conduct with numerous other people, including two other Foreign Service officers, the assistant military attache of a non-NATO country, and two nationals of a Communist country. Petitioner revealed that conduct to a USIA security officer during a debriefing at the end of his posting. Pet. App. 6a, 37a, 70a-71a, 92a-93a.[1]

After an investigation into petitioner's homosexual conduct in Belgrade, the Personnel Director of USIA, Angie Garcia, notified petitioner in October, 1984, that she was recommending that his limited appointment be terminated pursuant to Sections 610 and 611 of the Foreign Service Act, 22 U.S.C. 4010, 4011, based on his misconduct in violating USIA's fraternization policy.[2] In a subsequent meeting with

---

[1] During petitioner's posting in Belgrade, USIA received secret information concerning petitioner, about which he was also questioned during his debriefing. Pet. App. 6a. The information was filed under seal with the district court and the court of appeals and is available to this Court upon request. *Ibid.*

[2] Section 611 of the Foreign Service Act, 22 U.S.C. 4011, provides in pertinent part:

> Except as provided in section 4010(a)(2) of this title, the Secretary [of State] may terminate at any time the appointment of any member of the Service serving under a limited appointment * * *.

The provision to which Section 611 refers, Section 4010(a)(2) of Title 22 (§ 610(a)(2) of the Act), provides in relevant part:

Garcia, petitioner claimed that he had not been told of that policy. Based on that claim, Garcia withdrew the proposed termination in December, 1984, and issued, instead, a letter of reprimand "based on the poor judg[]ment and indiscretion demonstrated by [petitioner's] actions." Pet. App. 6a; see also *id.* at 38a, 71a, 93a-94a, 102a-103a.

In January, 1985, the USIA Director of Security, Bernard Dowling, told Garcia in a written memorandum that he would "not approve any foreign service assignment of [petitioner] because of the strong security risk involved." Pet. App. 6a. Dowling's memorandum stated:

> I have again reviewed [petitioner's] security file, particularly his actions at his last overseas post. As you know, he submitted a signed statement to the Office of Security on August 21, 1984 wherein he admitted engaging in homosexual relationships with eight different men, including two citizens of Yugoslavia while he was serving in Belgrade, Yugoslavia.[3] By engaging in such conduct, he not only showed poor judgment and lack of discretion, he also committed acts which we feel

---

A member of the Service who * * * is assigned to a salary class in the Foreign Service Schedule and who * * * (B) if separation is to be by reason of misconduct, is serving under a limited appointment, shall not be separated from the Service under this section until the member has been granted a hearing before the Foreign Service Grievance Board and the cause for separation established at such hearing * * *.

[3] It appears that petitioner admitted to engaging in homosexual conduct with five, not eight, people while in Belgrade. 91-5339 Gov't C.A. Br. 5.

> make him a security risk in any foreign service assignment. Specifically, he admitted that he had been open about his homosexuality with a number of other Yugoslav nationals with whom he socialized, including those who would obviously be relied upon as informants by hostile intelligence services. Therefore, to allow [petitioner] to serve in an overseas capacity would be an intolerable security risk since his homosexuality would make him an extremely likely target for hostile intelligence approaches. Also, in some seventy foreign countries homosexual acts are illegal and punishable by law. Therefore, by [*sic*] simply engaging in homosexual activity while overseas would place him in violation of the laws of most foreign countries thus further increasing his vulnerability to hostile approaches. Consequently, I will not approve any foreign service assignment of [petitioner] because of the strong security risk involved.
>
> This should not preclude him from a domestic assignment where possible hostile intelligence approaches are less bold and can be more carefully monitored and controlled.

Pet. App. 103a.

On January 25, 1985, Garcia notified petitioner that she was terminating his limited appointment "by authority of Section 611 [of the Foreign Service Act]." Pet. App. 40a. She explained that, because of the Office of Security's determination that he could not receive security clearance for any overseas assignments, there was no need for his services in the Foreign Service. *Id.* at 104a. She emphasized that the termination of petitioner's limited appointment

was "not a disciplinary or performance-based action." *Id.* at 40a.

The termination of petitioner's limited appointment took effect on March 2, 1985. Pet. App. 7a. The next day, petitioner was appointed to a domestic civil service appointment at a higher salary. *Id.* at 38a. Petitioner remained in this appointment until October, 1993, when he secured a limited Foreign Service appointment in the Department of State. Pet. 3 n.1.

b. Petitioner filed a complaint with the Foreign Service Grievance Board (FSGB or Board) challenging the termination of his limited appointment. See Pet. App. 7a. In March, 1987, the Board ordered the USIA to reinstate petitioner with a five-year appointment as an officer candidate and to remove the restriction withholding security clearance from petitioner for overseas assignments. *Id.* at 118a.

The Board first determined that it had jurisdiction over petitioner's complaint. Pet. App. 107a-109a. The Board deemed it unnecessary to decide whether, as USIA argued, the termination of petitioner's limited appointment was unreviewable because it was made pursuant to Section 611 of the Act. See 22 U.S.C. 4131(b)(3) (excluding "the termination of a limited appointment under section [6]11 of th[e] [Act]" from the definition of "grievance[s]" over which the Board has jurisdiction). In the Board's view, even if it lacked jurisdiction to review USIA's decision to terminate the appointment, it had authority to review USIA's decision to deny petitioner security clearance for overseas assignments under the Federal Circuit's decision in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), rev'd, 484 U.S. 518 (1988). Pet. App. 107a-109a. If the denial of overseas security clearance was

erroneous, the Board reasoned, then so too was the termination of petitioner's limited appointment, since the termination "was based solely on the determination of the [USIA] Office of Security not to clear [petitioner] for an overseas assignment." *Id.* at 106a.

Applying the standard of review adopted by the Federal Circuit in *Egan*, the Board determined that there was no "rational nexus" between the USIA's denial of overseas security clearance to petitioner and the evidence on which the denial was based. Pet. App. 115a; see also *id.* at 109a. The Board credited petitioner's claim that he had not been told of USIA's fraternization policy at the time of his posting to Belgrade. *Id.* at 111a-112a. The Board also credited petitioner's assertion that "if the practice of homosexuality were prohibited in a country of assignment, he would be prepared to remain sexually inactive while there." *Id.* at 114a. Based on those assertions, the Board concluded that there was no reason to believe that petitioner would violate the laws regarding homosexual conduct in any foreign country to which he was posted or that he posed a security risk. *Id.* at 113a-115a.

2. The USIA commenced this action in the United States District Court for the District of Columbia, seeking to set aside the Board's order. Petitioner counterclaimed for enforcement of the order. In addition, petitioner claimed that the USIA's failure to comply with the order violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and deprived him of liberty and property without due process. See Pet. App. 39a. In an amended counterclaim, petitioner also alleged a violation of the equal protection component of the Due Process Clause,

interference with his employment opportunities, and unlawful reprisal. *Ibid.*; see also *id.* at 52a.

On April 20, 1989, the district court granted the USIA's motion to set aside the Board's order. Pet. App. 69a-83a. It held that the Board "did not have the authority to review USIA's revocation of [petitioner's] security approval for overseas service." *Id.* at 79a. In so holding, the court relied on this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), which was handed down after the Board's decision and which reversed the decision of the Federal Circuit upon which the Board had relied. See Pet. App. 39a.[4] The court also dismissed petitioner's claim that he had been deprived of a property interest without due process. *Id.* at 81a. Subsequently, on May 31, 1989, the court dismissed petitioner's claims that he had been deprived of liberty without due process and that USIA's action violated the APA. *Id.* at 86a-90a.

3. The court of appeals affirmed all of the district court's rulings. It remanded the case to the district court, however, for consideration of the claims in petitioner's amended counterclaim that the district court had not yet considered. Pet. App. 35a-36a.

The court of appeals held, first, that the Board did not have jurisdiction to review either the termination of petitioner's limited appointment or the security clearance decision underlying the termination. Pet.

---

[4] In *Egan*, a government employee was removed from his position because he was denied the security clearance necessary for that position. 484 U.S. at 520-523. This Court held that, although the Merit Systems Protection Board could review the removal, the Board could not review the underlying denial of security clearance. *Id.* at 525-534.

App. 40a-44a. The court determined that the termination of petitioner's limited appointment was not a "grievance" within the Board's jurisdiction, because it was "legitimately classified under § 611," rather than under Section 610(a)(2) of the Act. The court adopted the Board's finding that the termination of petitioner's appointment was not made "by reason of misconduct" within the meaning of Section 610(a)(2) but instead "was based solely on the determination of the Office of Security not to clear [petitioner] for an overseas assignment." Pet. App. 41a. However, the court rejected the Board's theory that, even if it lacked authority to review the termination itself, it could nevertheless review the security clearance decision underlying the termination. *Id.* at 43a.

The court of appeals affirmed the dismissal of petitioner's APA claim. It held that the USIA's termination of petitioner's limited appointment was not reviewable under the APA because it was "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court observed that the provision under which petitioner's appointment was terminated, Section 611 of the Foreign Service Act, "imposes fewer shackles on the agency head's decisionmaking than the corresponding provision in the 1947 National Security Act, which the Supreme Court [in *Webster* v. *Doe*, 486 U.S. 592 (1988)] found precluded judicial review." Pet. App. 45a.

The court of appeals also affirmed the dismissal of petitioner's claims that he had been deprived of property and liberty without due process. Pet. App. 47a-51a. The court observed that, to demonstrate deprivation of a protected liberty interest, petitioner was required to "show that the agency altered his status in a tangible way, and that an imposition of

stigma or injury to reputation accompanied this change in status." *Id.* at 47a. The court explained that petitioner's status had not changed in a constitutionally cognizable way because, after his appointment was terminated, he was hired by USIA in a different capacity with a pay increase. *Ibid.* Petitioner had not shown damage to his reputation, the court determined, because "USIA's termination letter explicitly stated that he was not disqualified from any future domestic government employment, and the record contains no evidence that [petitioner's] attractiveness to potential employers has been reduced." *Id.* at 48a (citations and internal quotation marks omitted). The court further held that petitioner's "circumscribed" property interest in his limited appointment had been terminated by procedures, and under a standard, that satisfied due process. *Id.* at 49a-50a.

4. On remand, petitioner claimed that USIA had deprived him of equal protection by terminating his limited appointment on the basis of his sexual orientation. Pet. App. 56a-57a. The district court granted summary judgment for USIA on that claim. *Id.* at 57a-59a. The court reaffirmed its prior determination that "USIA did not deny [petitioner] security clearance approval for overseas service because of his homosexuality, but because of the particular homosexual conduct that he engaged in while in Belgrade." *Id.* at 57a (internal quotation marks omitted).[5]

---

[5] The district court also granted summary judgment for USIA on petitioner's claim of interference with prospective employment. That claim was based on a letter from USIA to the Defense Industrial Security Clearance Office (DISCO) re-

5. The court of appeals again affirmed all of the district court's rulings, this time by a divided vote. Pet. App. 5a-34a. A majority of the panel upheld the district court's award of summary judgment to USIA on petitioner's equal protection claim. *Id.* at 8a-12a.

The court of appeals observed that, by analogy to the framework for "mixed motive" Title VII claims outlined in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), petitioner could not prevail on his equal protection claim, even if his sexual orientation played some role in USIA's termination of his appointment and constituted an impermissible factor, if USIA could prove that it "would have made the same decision even in the absence of the impermissible factor." Pet. App. 9a. The court determined that such proof had been established by undisputed evidence. Thus, the court found that "[i]n this case, it is clear that the USIA would have terminated [petitioner] from the Foreign Service on the basis of his conduct, *i.e.*, regardless of his sexual orientation." *Ibid.* The court also found it "beyond genuine dispute that the

---

sponding "yes" to the question whether USIA had any "adverse information" on petitioner. Relying on the exception in the Federal Tort Claims Act precluding liability for "claim[s] arising out of * * * interference with contract rights," 28 U.S.C. 2680(h), the court held that petitioner's claim was barred by sovereign immunity. Pet. App. 60a-61a. In the alternative, the court held that USIA's response to DISCO's inquiry was not actionable because it "was no more than an accurate response to an authorized inquiry." *Id.* at 62a (footnote omitted). Finally, the district court held that it lacked jurisdiction over petitioner's reprisal claim. *Id.* at 63a-67a.

The court of appeals affirmed the dismissal of petitioner's interference and reprisal claims, Pet. App. 12a-15a, and they are not at issue in this Court.

USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country." Such conduct, the court remarked, "reflects appallingly poor judgment and virtually invites an approach from a hostile intelligence service." *Ibid.* The court also observed that "[petitioner] can point to no pattern, or even instance, of USI[A] disciplinary action to suggest that the agency discriminated against him in his security review on account of his homosexuality." *Id.* at 11a.

The majority then addressed the dissent's assertion that its analysis of petitioner's equal protection claim was inconsistent with the court's decision when petitioner had previously been before it (*Krc I*). Pet. App. 10a n.*. In *Krc I*, the majority explained, the court of appeals had held that petitioner's limited appointment had not been terminated for "misconduct" within the meaning of Section 610(a)(2) of the Act. Pet. App. 10a n.*. But the majority observed that "conduct that is not misconduct can have an adverse national security implication" and thus be relevant "to the USIA's determination about an individual's fitness for Foreign Service duty overseas." *Ibid.* That was the case here: "[S]everal factors, especially [petitioner's] ill-advised conduct, contributed to the agency's decision to terminate [petitioner's] Foreign Service appointment." *Ibid.* Even if one of those factors was petitioner's sexual orientation, the majority found it "perfectly clear that the USIA would have terminated [petitioner's] Foreign Service appointment based solely upon the legitimate reasons it gave—i.e., [petitioner's] sexual

indiscretions in combination with the Secret information regarding him." *Id.* at 11a n.*.

Judge Wald dissented from the majority's affirmance of summary judgment for USIA on petitioner's equal protection claim. Pet. App. 15a-34a.[6] She believed that the court of appeals in *Krc I* decided that the termination of petitioner's limited appointment "stemmed from [petitioner's] sexual orientation, not from any lack of judgment evinced by his sexual conduct." *Id.* at 15a. She also believed that, in any event, there was a genuine dispute of fact whether petitioner's sexual orientation played a role in the termination of his appointment. *Id.* at 23a-33a.

ARGUMENT

1. Petitioner first contends (Pet. 12) that the court of appeals' decisions in *Krc I* and *Krc II* "are squarely in conflict." That contention does not merit further review.

a. This Court ordinarily does not grant review to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In addition, the asserted conflict between *Krc I* and *Krc II* does not involve any issue of broad importance. On the contrary, the alleged conflict is entirely case-specific: whether petitioner's limited appointment in the Foreign Service was terminated because of his conduct or because of his sexual orientation. That issue would not warrant further review even if it were the subject of a conflict in the courts below.

---

[6] Judge Wald also dissented from the majority's affirmance of the award of summary judgment for USIA on petitioner's interference-with-employment claim. She concurred, however, in the affirmance of the district court's dismissal of the reprisal claim. Pet. App. 19a n.3.

b. In any event, *Krc I* and *Krc II* do not conflict. The two decisions involved different issues, and the court of appeals resolved those issues in a consistent manner.[7]

i. The issue in *Krc I* was whether the Foreign Service Grievance Board had jurisdiction over petitioner's challenge to the termination of his limited appointment. The resolution of that issue depended on the reason for the termination. If petitioner's appointment was terminated "by reason of misconduct," then it was a termination under Section 610(a)(2) of the 1980 Foreign Service Act, 22 U.S.C. 4010(a)(2)(B), which the Board had jurisdiction to review. On the other hand, if petitioner's appointment was terminated for some reason other than misconduct, then it was properly classified as a termination under Section 611 of the Act, which the Board lacked authority to review. 22 U.S.C. 4131(b)(3).

The court of appeals in *Krc I* held that petitioner's appointment was not terminated because of "misconduct." Instead, the court determined, the termination was based on the Office of Security's decision to revoke petitioner's security clearance for overseas assignments; it was not based on whether petitioner had "violated a canon of conduct governing Foreign Service officers." Pet. App. 41a. The court's determination was consistent with the Board's finding that petitioner's termination "was based solely on the determination of the [USIA] Office of Security not to

---

[7] The court of appeals in *Krc II* specifically addressed the asserted conflict and decided that no such conflict exists. Pet. App. 10a n.*. Moreover, the D.C. Circuit's denial of rehearing en banc reflects the full court's judgment that there is no conflict requiring resolution. *Id.* at 2a.

clear [petitioner] for an overseas assignment." *Id.* at 106a.

The distinction between the termination of petitioner's limited appointment, on the one hand, and the security decision that led to the termination, on the other hand, is a meaningful one. As the court in *Krc I* held in a ruling that petitioner does not challenge in this Court, the Board had no jurisdiction to review USIA's revocation of overseas security clearance. Pet. App. 42a-44a. That holding follows from this Court's decision in *Egan*, which held that, even though the Merit Systems Protection Board (MSPB) had authority to review the removal of a government employee, it lacked authority to review the denial of security clearance that led to the employee's removal. 484 U.S. at 525-534.[8]

---

[8] As the court of appeals recognized, "*Egan* does not squarely control the FSGB's authority here," because the FSGB's authority derives from a different statute than the one that governs the MSPB's authority to review personnel actions, and because this case involves a modification, rather than a denial, of a security clearance. Pet. App. 42a-43a. Nonetheless, the court of appeals correctly determined that *Egan* is instructive here for two reasons. First, "[t]he *nature* of USIA's decision [modifying petitioner's security clearance] * * * is analogous to the Navy's decision in *Egan*," because both represented the agency's "[assessment] whether, under compulsion of circumstances or for other reasons, [petitioner] might compromise sensitive information." *Id.* at 43a, quoting *Egan*, 484 U.S. at 528 (some bracketed material supplied by court of appeals; some bracketed material added). Second, the FSGB, like the MSPB, "does not appear to be the kind of inside expert body that, *Egan* suggested, might be qualified to review the substance of the agency's [security] decision." Pet. App. 43a; see 22 U.S.C. 4135(a) (FSGB composed of "independent" citizens "who are not employees of the Department [of State] or members of the [Foreign] Service").

ii. Unlike the court of appeals in *Krc I*, the court of appeals in *Krc II* did address the question whether USIA's decision to revoke petitioner's overseas security clearance was based on conduct. That issue was before the court because of petitioner's equal protection challenge to USIA's decision. Cf. *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988).

The court in *Krc II* held that USIA's security clearance decision was based on his sexual conduct, and not on his sexual orientation. That holding rested on the undisputed evidence "that the USIA would have terminated the Foreign Service appointment of an officer who had heterosexual escapades with the military attache of a neutral country and with nationals of a Communist country," Pet. App. 9a, and the lack of evidence of any "pattern, or even instance, of USI[A] disciplinary action to suggest that the agency discriminated against [petitioner] in his security review on account of his homosexuality." *Id.* at 11a. The holding in *Krc II* concerning the reason for the *security clearance decision* thus plainly did not conflict with the holding in *Krc I* on the different issue of the reason for the termination of petitioner's limited appointment.

2. Petitioner next contends (Pet. 15-17) that the courts below erred in granting summary judgment in favor of USIA on his equal protection claim. That fact-bound contention does not warrant further review.

Petitioner criticizes the court of appeals for relying on *Price Waterhouse* to determine the burdens of proof on his equal protection claim on the ground that *Price Waterhouse* was not cited in the USIA's briefs. Pet. 15. Petitioner does not challenge the court of appeals' determination that *Price Water-*

house provides the appropriate framework for assessing his claim. See Pet. App. 8a-9a. Instead, petitioner challenges only the court of appeals' determination that there was no genuine dispute that he was denied overseas security clearance because of his sexual conduct and not because of his sexual orientation. The district court, however, also determined that "[t]he government did not deny [petitioner] security clearance approval for overseas service because of his homosexuality, but because of the particular homosexual conduct that he engaged in while in Belgrade." Pet. App. 82a-83a; see also *id.* at 57a. Thus, at bottom petitioner's challenge to the award of summary judgment is based on his disagreement with findings of fact concurred in by both courts below. This Court generally does not review such challenges, see, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967), and petitioner provides no reason for the Court to depart from that practice in this case.

Nor does the partial dissent in *Krc II* suggest any need for review by this Court. In her dissent, Judge Wald cited three items of evidence that she believed suggested that the decision to revoke petitioner's overseas security clearance was based on his sexual orientation. Pet. App. 18a-19a. The majority reasonably concluded, however, that the evidence before the district court did not create a genuine factual dispute. Judge Wald cited, first, the memorandum in which the USIA Director of Security, Bernard Dowling, explained why he was denying petitioner overseas security clearance. *Id.* at 19a. That memorandum (reproduced in full at pp. 3-4, *supra*, and at Pet. App.

103a) focused on petitioner's conduct, not his orientation.[9] Judge Wald next cited testimony that another member of the USIA's Security Office said that petitioner's "problem" was his "sexual preference," a "type of behavior" that the Foreign Service does not "condone." *Id.* at 19a. Testimony that homosexual "behavior" is generally not "condone[d]," however, is not equivalent to evidence that petitioner was discriminated against because of his homosexual orientation. Finally, Judge Wald cited testimony concerning a statement by Dowling "suggest[ing]" that he considered homosexuality a disqualification for employment in the Foreign Service. *Ibid.* The relevance of that testimony is extremely attenuated, because (1) it related to a single statement; (2) that statement did not relate to petitioner; (3) the statement was made a significant amount of time after the challenged conduct took place; (4) the statement was only "suggest[ive]" of bias based on sexual orientation; and (5) the statement apparently did not purport to reflect agency policy. In sum, Judge Wald's dissent suggests, at most, that reasonable minds could differ on the question whether the evidence sufficed to preclude summary judgment on petitioner's equal protection claim. And that fact-bound question does not warrant this Court's review.

3. Petitioner renews his contention (Pet. 17-19) that the termination of his limited appointment

---

[9] Although Judge Wald attached significance (Pet. App. 18a-19a) to the statements in the memorandum that petitioner "had been open about his homosexuality with a number of other Yugoslav nationals," and that homosexual conduct is illegal in 70 other countries, *id.* at 103a, those statements refer to conduct, not sexual orientation.

violated the Due Process Clause. The court of appeals in *Krc I* correctly rejected that contention. Pet. App. 47a-51a.

The court of appeals in *Krc I* correctly held that USIA did not deprive petitioner of a protected property interest without due process. As the court recognized, petitioner's property interest in his limited appointment was only "a circumscribed one." Pet. App. 50a; see *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). As the court explained, under the statutes and regulations governing limited appointments, "USIA retains discretion to determine when the need no longer exists for the employee's services or when continued employment would not promote the efficiency of the Service." Pet. App. 50a (internal quotation marks and citations omitted); see 22 U.S.C. 3905, 4010(a)(1); 3 Foreign Affairs Manual § 767.1 (1984). The court then correctly determined that it was reasonable for USIA to terminate petitioner's limited property interest based on the conclusion that there was no further need for his services after his overseas security clearance had been revoked. Pet. App. 50a. And as both the district court and the court of appeals subsequently held in *Krc II*, the revocation of petitioner's security clearance was reasonable in light of his conduct in Belgrade. Pet. App. 8a-12a, 57a-59a.[10]

---

[10] Petitioner criticizes (Pet. 18) the court of appeals for failing in *Krc I* to address whether the revocation of his security clearance for overseas assignments was "patently arbitrary or discriminatory," and thus a violation of substantive due process. That criticism is unfounded, since petitioner did not allege a violation of substantive due process in his amended counterclaim. Instead, he asserted only *procedural* due process challenges to the revocation of his overseas security clearance

The court of appeals in *Krc I* also correctly rejected petitioner's claim that he was deprived of a liberty interest without due process. Pet. App. 47a-48a; see *Paul* v. *Davis*, 424 U.S. 693, 708-710 (1976). As the court of appeals determined, that claim failed for two independent reasons. First, petitioner did not demonstrate a "loss of government employment sufficient to constitute a constitutionally cognizable change of status." Pet. App. 47a (internal quotation marks omitted). In fact, he was rehired by USIA in a domestic position at a higher salary the day after his Foreign Service appointment was terminated. Second, petitioner did not demonstrate that the USIA's actions damaged his reputation in a manner that interfered with his employment prospects. USIA's termination letter specifically stated that he was not disqualified from future domestic government employment. Moreover, petitioner had not presented any evidence in the record before the court in *Krc I*

(in Count III) and to the termination of his limited appointment (Count IV). See C.A. Appellant Public App. 245 (security clearance decision "was made without affording [petitioner] a statement of the reasons therefor or a fair opportunity to challenge the determination"), 246 (same allegation regarding termination decision). The court of appeals in *Krc I* correctly rejected petitioner's procedural due process claims, finding that USIA complied with applicable regulations by providing petitioner with notice of the impeding termination and by terminating him "on a ground expressly provided in its own regulations"—*i.e.*, that there was no need for his services. Pet. App. 50a; see *Sampson* v. *Murray*, 415 U.S. 61, 64 (1974). Furthermore, both the district court and the court of appeals addressed the rationality of USIA's actions in ruling upon petitioner's equal protection claim in *Krc II*. Pet. App. 8a-12a, 57a-59a. Thus, the courts below fully considered petitioner's procedural and substantive challenges to USIA's actions.

that the termination had actually affected his employment prospects. Finally, petitioner had not shown that USIA had published its finding that he constituted a security risk. Pet. App. 48a.[11]

4. Petitioner next contends that the court of appeals in *Krc I* erred in rejecting his claim that USIA's actions violated the APA and the Foreign Service Act. That contention is without merit.

The court of appeals properly relied on *Webster* v. *Doe*, 486 U.S. 592 (1988), to uphold the dismissal of petitioner's statutory claims. Pet. App. 44a-46a. In *Webster* v. *Doe*, this Court held that a decision by the Director of the Central Intelligence Agency to terminate an employee under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), was "committed to agency discretion by law" within the

---

[11] In Count VI of his amended counterclaim, petitioner alleged that USIA interfered with his employment opportunities by reporting to the DISCO that it had "adverse information" about petitioner. C.A. Appellant Public App. 247-248. Although petitioner now characterizes this claim as based on the Due Process Clause (Pet. 18-19), he did not cite any constitutional or statutory provision in the counterclaim to support his interference claim. In any event, that claim was not before the court of appeals in *Krc I*, because it had not then been considered by the district court. Pet. App. 52a. On remand, the district court awarded summary judgment for USIA on the interference claim on the grounds that it was barred by sovereign immunity and, in the alternative, that USIA's answer to DISCO's inquiry was an accurate response that was authorized under USIA regulations. *Id.* at 59a-63a; see also 55 Fed. Reg. 31,963 (1990) (authorizing USIA to disclose "relevant data" to "duly authorized security officers of other agencies" regarding "significant security information in the file of a USIA employee"). The court of appeals in *Krc II* affirmed on the latter ground, Pet. App. 13a-14a, and petitioner's challenge to that ruling (Pet. 18-19) does not warrant further review.

meaning of 5 U.S.C. 701(a)(2) and therefore was not reviewable under the APA. 486 U.S. at 599-601. As the court of appeals determined, Section 611 of the Foreign Service Act, which authorizes USIA to terminate a limited appointment "at any time," 22 U.S.C. 4011, "imposes fewer shackles on the agency head's decisionmaking" than Section 102(c) of the National Security Act. Pet. App. 45a. Thus, as was true of the statute at issue in *Webster* v. *Doe*, the statute at issue here "'fairly exudes deference' to the Secretary [of State] when Foreign Service personnel decisions implicate national security." Pet. App. 45a, quoting *Webster* v. *Doe*, 486 U.S. at 600.

Petitioner errs in contending (Pet. 19) that USIA's discretion was constrained by the requirement in 22 U.S.C. 3905(a) that "[a]ll personnel actions" accord with "merit principles." As the court of appeals observed (Pet. App. 46a), the definition of "personnel actions" omits revocations or modifications of security clearance. 22 U.S.C. 3905(a). In light of that omission, it is doubtful that USIA's actions had to comply with merit principles. Moreover, the statutory prescription of merit principles does not expressly bar discrimination on the basis of sexual orientation. 5 U.S.C. 2302(b)(1). But even if such discrimination were implicitly barred by the statute, it would not help petitioner. As the court of appeals subsequently held in *Krc II*, petitioner was terminated because of his sexual conduct, not his sexual orientation. Pet. App. 8a-11a.

Finally, even if discrimination on the basis of sexual orientation were barred by merit principles, and even if petitioner's sexual orientation played some limited role in the revocation of his security clearance and the subsequent termination of his

limited appointment, it would not be appropriate on the facts of this case for a court to hold that USIA's actions violated those principles. As discussed above, there is no genuine dispute that USIA would have determined, without regard to petitioner's sexual orientation, that his conduct impaired his ability to "serve in assignments throughout the world," 22 U.S.C. 3901(a)(4), as members of the Foreign Service are required to do, and accordingly "adversely affect[ed] [his] performance." 5 U.S.C. 2302(b)(10). Under the circumstances of this case, as found by both lower courts, USIA's actions comported with merit principles.

5. Petitioner's final contention (Pet. 20-22) is that the court of appeals erred in holding in *Krc I* that the Foreign Service Grievance Board lacked jurisdiction to review his complaint. The court of appeals' holding was correct.

The Board plainly lacked jurisdiction to review the termination of petitioner's limited appointment. The USIA expressly premised the termination on Section 611 of the Foreign Service Act. See Pet. App. 94a, 104a; see also *id.* at 106a. Subsequently, the Board itself and the court of appeals found that the termination was indeed based on Section 611, and not on Section 610(a)(2) of the Act. Pet. App. 40a-41a, 106a. There is no basis for further review of that finding, and that finding compelled the conclusion that the Board lacked jurisdiction to review petitioner's termination. As the court of appeals stated, "the statute makes clear that a limited appointee who the Board finds was not terminated for misconduct—whose termination was properly classified under § 611—has no further remedy with the FSGB; such a termination is statutorily excluded from the 'grievances'

within the Board's jurisdiction." Pet. App. 41a-42a; see 22 U.S.C. 4131(b)(3).

The Board also lacked jurisdiction to review the security clearance decision that led to the termination of petitioner's limited appointment. That conclusion follows from *Egan*, in which the Court held that the MSPB lacked authority to review the security determination underlying removal of a government employee, even though it had authority to review the consequent removal. 484 U.S. at 525-534; see also *Cole* v. *Young*, 351 U.S. 536, 546 (1956) ("an agency head * * * should have the final say in deciding whether to repose his trust in an employee" by the grant of security clearance); *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir.), cert. denied, 488 U.S. 825 (1988) (MSPB lacked authority to review Air Force's suspension of security clearance).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
Attorney

JANUARY 1994